IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1711 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VINODKUMAR CHANDRASINH JAIN MARVADI - Appellant(s)
Versus
THE STATE OF GUJARAT - Opponent(s)

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Appearance :
MR US BRAHMBHATT for Appellant(s) : 1,
MR KT DAVE, ADDL. PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 26/04/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE ANIL R. DAVE)

Being aggrieved by the judgment and order dated 3.12.2002 passed by the Jt. District Judge, Ahmedabad (Rural), Ahmedabad in Sessions Case No. 52/02, the appellant-convict has filed this appeal.

2. By virtue of the impugned order, the appellant has been held guilty of an offence under sec. 397 of the Indian Penal Code and has been sentenced to Rigorous Imprisonment for 10 years and a fine of Rs. 1,000/-, in default of payment to undergo one month's Simple Imprisonment.

3. The facts stated by the prosecution, in a nutshell, are as under:

3.1 Minaxiben, PW No. 1 (Ex. 12) (hereinafter referred to as 'the complainant') was travelling in Saurashtra Janata Express from Mumbai to Jamnagar on 20th September, 2001 with her mother-in-law, Lilavatiben Dediya. The said train had arrived at Ahmedabad around 11 p.m. on that day and thereafter the complainant had gone to her berth for sleeping. Around 3.15 a.m., somebody woke her up and upon inquiring as to who was the said person, the said person had shown a knife to the complainant and asked her to give whatever gold she had. Thereupon the complainant had tried to give her wrist watch, but the appellant told her not to take out the wrist watch but to give whatever gold she had. Thereupon the complainant had taken out four gold bangles from her right hand and given to him. As the complainant

was frightened, she could not shout but with great difficulties she shouted for help and therefore one person from the adjoining compartment had come there, but the appellant had shown knife to that person also and, therefore, being afraid of the appellant, he sat down on the adjoining seat. Thereafter the appellant asked the complainant as to who was the person who was sleeping on another berth. Thereupon the complainant started shouting and said to her mother-in-law that a thief had come. In the circumstances, the mother-in-law – Lilavatiben - also got up and started shouting and therefore the appellant ran away. Because of the incident some passengers had gathered and it was decided to give a complaint. The next station was Viramgam. Though it was decided to give a complaint, for the purpose of giving complaint the complainant had to get down at Viramgam, but as it was not possible, the complainant had gone to Jamnagar and at Jamnagar she had filed an F.I.R. At the time of filing the F.I.R. the complainant had given description of the appellant and she had also stated in the F.I.R. that it was possible for her to identify the appellant as well as the knife, which had been shown to her by the appellant. The bangles, which had been looted from the complainant, were weighing approximately 5 tolas and were worth Rs. 20,000/-.

3.2 After some time the complainant had been called at Viramgam in the office of the Executive Magistrate for the purpose of identification of the appellant-

accused. A test identification parade ('TI parade' for short) had been conducted and at that time the appellant had been identified by the complainant.

3.3 In the course of the trial, the Sessions Court had examined the following witnesses:

(1)Minaxiben Dediya, complainant, PW No. 1 (Ex. 12)
(2)Bachubhai Harjivanbhai, panch witness, PW No. 2 (Ex. 15)
(3)Motibhai Pitambarbhai, Panch witness, PW No. 3 (Ex. 17)
(4)Ranjit Labhshanker, PSI who had received the FIR, PW No 4 (Ex.19)
(5)Bachubha Amarsing Zala, panch witness, PW No. 15 (Ex. 20)
(6)Hasmukhbhai Joitram, Mamlatdar & Executive Magistrate before whom test identification parade had been conducted, PW No. 6 (Ex. 22)
(7)Biren Soni, goldsmith from whom gold ingot had been discovered and who turned hostile, PW No. 7 (Ex. 25)
(8)Anubha Parmar, Investigating Officer, PW No. 8 (Ex. 26)

The following important documentary evidence had also been considered in the course of the trial:

(1)FIR dated 21.9,2001 (Ex. 13)
(2)Discovery panchnama (Ex. 16)
(3)Panchnama of recovery of knife (Ex. 18)

(4)Recovery panchnama of muddamal (Ex. 27)

(5)Arrest panchnama of the appellant (Ex. 28-29)

(6)Test identification parade panchnama (Ex. 21)

3.4 After considering the relevant evidence, the Sessions Court held the appellant to be guilty of the offence charged against him and accordingly the impugned order of conviction and sentence has been passed.

4. Learned advocate Shri Brahmbhatt appearing for the appellant has submitted that the Sessions Court has not appreciated the evidence properly and the impugned order of conviction is bad in law. So as to substantiate his case he has submitted that the muddamal knife, which had been used in the course of the offence, had not been identified by complainant, Minaxiben, PW No. 1 (Ex. 12). He has further submitted that there was substantial delay in conducting the TI parade. Though the alleged offence had been committed on 21.9.2001, the TI parade had been conducted on 12.10.2001. According to him, because of the said delay, validity of the TI parade is vitiated.

5. He has thereafter submitted that at the time of TI parade police personnel were also present and presence of police at the venue would vitiate the TI parade.

6. The learned advocate has further submitted that

it is not possible to believe that the complainant had seen the appellant as the appellant was in sound sleep and it is difficult for anyone to get up all of a sudden from the sound sleep and to remember a person, who was before him or her especially when there is no sufficient light.

7. Thereafter it has been submitted by the learned advocate that mother-in-law of the complainant – Lilavatiben – has not been examined though it was possible to examine her as she was also a person who had seen the appellant. Non-examination of the said person should result into an adverse inference.

8. It has been also submitted by him that no injury had been caused to anyone and, therefore, provisions of sec. 397 of IPC could not have been invoked.

9. The learned advocate has also submitted that other co-accused have been acquitted and, therefore, the appellant should also have been acquitted.

10. Lastly, it has been submitted that it has not been established that gold ingot was made from the bangles which had been alleged to have been extorted from the complainant.

11. Learned advocate Shri Brahmbhatt has relied upon the following judgments to substantiate his submissions:

(1)Umesh Kamat v. State of Bihar, (2005) 9 SCC 200

(2)Puttan @ Kamal Prasad v. State of U.P., AIR 1992 SC 1032

(3)Somappa Vamanappa Madar and Shankarappa Ravanappa Kaddi v. State of Mysore, (1980) 1 SCC 479

(4)Anil Kumar v. State of U.P.,(2003) 3 SCC 569

(5)State of M.P. v. Ghudan, (2003) 12 SCC 485

(6)Parakinkar Chakma v. State of Tripura, AIR 1955 TRIPURA 19

(7)Lal Singh and others v. State of U.P., (2003) 12 SCC 554

12. On the other hand, learned APP Shri K.T. Dave has submitted that identification of knife is hardly of any importance in view of the fact that the appellant had been duly identified. He has also submitted that the TI parade was held properly and immediately after the appellant had been arrested and, therefore, there was no delay caused in conducting the TI parade. It has been submitted by him that looking to the peculiar facts and circumstances of the case, the complainant had rightly identified the appellant and therefore it cannot be said that there was any doubt with regard to identification of the appellant. Mother-in-law of the complainant being an old lady was rightly not troubled by calling as a witness especially when she is a resident of Mumbai, whereas the trial had been conducted at Viramgam in Gujarat. He has submitted that as the appellant had used a knife having

approximately 5 inch long blade, it cannot be said that provisions of sec. 397 could not have been invoked. He has also submitted that simply because other accused have been acquitted due to lack of evidence against them, conviction of the appellant cannot be said to be bad. So far as muddamal is concerned, it has been established that the gold ingot had been made only from the bangles of the complaint.

13. For the aforesaid reasons, the learned APP has submitted that the order of conviction deserves to be upheld as it is just, legal and proper.

14. We have heard the learned advocates at length and have also gone through the record and proceedings quite carefully.

15. Upon going through the entire evidence, in our opinion, it cannot be said that the Sessions Court has committed any error while convicting the appellant. In our opinion, the submissions made by learned advocate Shri Brahmbhatt appearing for the appellant has no substance.

16. Simply because the knife could not be identified by the complainant in the court room would not mean that the appellant was not involved in the offence, especially when the appellant had been duly identified in the TI parade (Ex. 21)

17. It has been submitted on behalf of the appellant that TI parade had been conducted after about a month. The said submission appears to be factually incorrect. The offence had taken place on 21.9.2001 and the TI parade had been conducted on 12.10.2001. The aforesaid dates clearly reveal that submission of the learned advocate appearing for the appellant is not correct that TI parade had been conducted after a month. Upon perusal of the record, we find that the offence had been committed on 21.9.2001 around 3.15 a.m. whereas the appellant had been arrested on 8.10.2001. Immediately upon arrest of the appellant, a request was made to the Executive Magistrate for conducting the TI parade and, therefore, the complainant, who stays at Mumbai, had been informed by the Executive Magistrate to remain present in his office on 12.10.2001 and accordingly the complainant had remained present at the time of TI parade, which had been conducted on 12.10.2001 and had identified the appellant. Thus, on 8.10.2001 the appellant had been arrested and on 12.10.2001 the TI parade had been conducted. Thus, it is clear that there was no delay in conducting the TI parade. The said submission with regard to delay in conducting TI parade is therefore not acceptable.

18. It has been submitted by the learned advocate appearing for the appellant that at the time of conducting the TI parade, some police personnel were present, which would vitiate the proceeding. The said submission does not appear to be true. If one

looks at the evidence of Hasmukhbhai Joitram, PW No. 6 (Ex. 22), it is clear that at the time when the TI parade had been conducted, no police personnel were present in his room. There is no reason for us to disbelieve the Executive Magistrate in whose presence the TI parade had been conducted and the appellant had been identified by the complainant.

19. The submission of the learned advocate for the appellant to the effect that the complainant could not have remembered the appellant is not of any consequence. It is true that when a person gets up from sound sleep, for some time he/she may not be well oriented, but in the instant case, when there was some talk between the complainant and the appellant, when another passenger from the adjoining compartment had come to the complainant and he too was shown the knife by the appellant and when even the mother-in-law of the complainant had got up and shouted for help, in our opinion, some time must have been consumed in the aforesaid process and during that period the complainant must have got a reasonably good chance to look at the appellant and even in dim light it is possible for the complainant to see the features of the appellant. The fact remains that at the time of the TI parade, the appellant has been identified by the complainant. In the circumstances, in our opinion, there is no substance in the submission made by the learned advocate that the complainant could not have remembered the appellant.

20. Non-examination of Lilavatiben, mother-in-law of the complainant, would not adversely affect the case of the prosecution. As seen from the record, age of Lilavatiben was more than 70 years at the relevant time. She being an old lady and a resident of Mumbai, she was rightly not summoned as a witness especially when the complainant, PW No. 1 (Ex. 12) remembered the appellant and had rightly identified him. Number of additional witnesses who can prove the same thing would not render additional help to the prosecution. In our opinion, looking to her age and the distance which the said lady had to travel, the prosecution has rightly not summoned Lilavatiben as a witness.

21. Simply because no injury was caused to anyone by the appellant, it would not mean that provisions of sec. 397 cannot be invoked. Section 397 of IPC reads as under:

> **"Robbery or dacoity, with attempt to cause death or grievous hurt**.-- If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years."

It is not necessary that some injury should have been caused to someone. Looking to the language of the section, it is sufficient if a deadly weapon is used

at the time of the offence. In the instant case a knife having approximately 5" long blade had been used, which can surely be treated as a deadly weapon.

22. Simply because co-accused of the appellant could not be convicted would not mean that the appellant should also have been acquitted. As the co-accused could not be identified or as there was no evidence againt them, they had to be acquitted by the Sessions Court but in view of sufficient evidence found against the appellant, he has been rightly convicted and in our opinion there is no reason to acquit him simply because other accused could not be convicted.

23. So far as muddamal gold is concerned, upon perusal of the evidence of Anubha Parmar, PW No. 8 (Ex. 26), it is clear that the said gold had been discovered from the possession of Biren Soni, PW No. 7 (Ex. 25). Looking to the evidence it is clear that the gold ingot discovered from the goldsmith was converted from the bangles of the complainant.

24. The judgments cited by the learned advocate to substantiate his submissions would also not render much help to him.

25. In the case of **Umesh Kamat v. State of Bihar** (supra) the facts are absolutely different because in the instant case the complainant has duly identified the appellant at the time of TI parade and there was sufficient light in the compartment so as to observe

features of the appellant.

26. The judgment in the case of **Puttan @ Kamal Prasad v. State of UP** (supra) would also not help the appellant for the reason that in the case on hand the TI parade had been conducted immediately after arrest of the appellant, whereas in the case cited by the learned advocate, TI parade had been conducted 6 months after arrest of the accused.

27. In the case of **Somappa Vamanappa Madar and Shankarappa Ravanappa Kaddi v. State of Mysore** (supra), TI parade was held to be unreliable on the facts of the case, whereas in the instant case, looking to the evidence adduced by Hasmukh Jaoitram, Executive Magistrate, PW No. 6 (Ex. 22) it is clear that no irregularity had been committed while conducting the TI parade. This judgment would also, therefore, not be of much help to the appellant.

28. In the case of **Anil Kumar v. State of UP** (supra), there was delay of 47 days in holding TI parade, whereas in the case on hand the TI parade had been held within 4 days from the arrest of the accused and, therefore, in our opinion, the aforesaid judgment will render no help to the appellant.

29. The facts of the case in **State of MP v. Ghudan** (supra) and the facts of the case on hand are absolutely different because in the aforesaid case the witness had no opportunity to see face of the

accused, whereas in the instant case the appellant was with the complainant for some time and she had reasonably good chance to look at the features of the appellant, who was hardly within 4-5 ft. distance. In the circumstances, the said judgment would not help the appellant.

30. Law laid down in the case of **Parakinkar Chakma v. State of Tripura** (supra) would also not help the appellant for the reason that the witness did not identify the accused in the TI parade, but subsequently at the time of trial, the accused had been identified. In the case with which we are concerned here, the appellant had been duly identified at the time of TI parade.

31. Looking to the facts of the case in **Lal Sigh and others v. State of UP** (supra), where the witness had no chance to see the accused and the TI parade had been conducted after considerably long period, whereas in the case on hand the complainant had an opportunity to see the appellant from a distance of about 4-5 ft. and the appellant had been duly identified in the TI parade, the said judgment also cannot come to the rescue of the appellant.

32. In the circumstances, we do not agree with any of the submissions made by the learned advocate and as we do not find any error in the impugned judgment and order of the learned Jt. District Judge, we dismiss the appeal. The judgment and order of

conviction dated 3.12.2002 passed by the learned Joint District Judge (Fast Track), Ahmedabad (Rural), Ahmedabad, in Sessions Case No. 52 of 2002 is upheld.

33. It is pertinent to note here that though it has been found that the gold ingot found from Biren Soni, PW No. 7 (Ex. 25) was converted from the bangles taken out from the complainant, the Sessions Court has ordered that the said muddamal should be forfeited to the State. In our opinion, the muddamal ought to have been given to the complainant, who was robbed of the said gold bangles, especially when nobody has claimed the said muddamal. We, therefore, direct that the said muddamal (gold ingot) be handed over the complainant upon proper identification of the complainant.

(Anil R. Dave, J.)

(K.S. Jhaveri, J.)

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